Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

PETER SUDARSKY,

Petitioner-Pro Se,

v.

CITY OF NEW YORK, NEW YORK CITY PLANNING DEPARTMENT, NEW YORK CITY TRANSIT AUTHORITY, and THE METROPOLITAN TRANSIT AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. May state courts impose a procedural requirement for notice-of-claim as a bar to suit in a case alleging the taking of property absent just compensation?

2. In a case involving the taking of property absent just compensation, may the New York State Court bar suit by imposing a state requirement for notice of claim in reliance upon its finding that the case lacks substantive merit when The Court's finding on the merits finesses applicable Supreme Court takings jurisprudence and is subversive of that jurisprudence?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Peter Sudarsky, and a related corporation, and the respondents, The City of New York, The New York City Planning Department and the New York City Planning Commission, and the New York City Metropolitan Transit Authority and The New York City Transit Authority.

A brief was filed amicus curiae by Defenders of Property, a Washington D.C. public service institute concerned with the protection of property rights, on behalf of appellant with the New York Appellate Division, First Department, in plaintiffs' first successful appeal of a lower court grant of summary judgment on grounds of res judicata and collateral estoppel. The brief was contained in the record of my first appeal, but the second appellate panel did not reach it. Defenders of Property in supporting my motion for leave to appeal reaffirmed its brief to the New York Court of Appeals.

(A quirk in the Appellate Division rules prevented the resubmission of the record before the first appellate panel.)

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My claim warrants trial of the issues because actions of defendants took all use of my property, regardless of the public purpose of the taking. 11

By the time the Appellate Division reached its decision in 1998 which is the subject of this petition, The 1991 Federal decision on which the State Court relied had been superceded, first by this Court and second by Judge Robert J. Ward, himself:. 11

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no. in the
Supreme Court of the United States
October Term, 1998

PETER SUDARSKY,

Petitioner

v.

City of New York, et al

Petition for a Writ of Certiorari to
The Court of Appeals of the State of New York

PETITION FOR WRIT OF CERTIORI

The petitioner Peter Sudarsky respectfully prays that a writ of certiorari issue to review the Feb. 3, 1998, judgment and order of the New York Appellate Division, First Department, and the February 23, 1999, denial of my Petition for Rehearing by the New York Court of Appeals in the above-captioned proceeding wherein the Court of Appeals refused to reconsider its rejection without explanation of my Motion for Leave to Appeal.

OPINIONS BELOW

The Feb. 1998 opinion of the Appellate Division, First Department, State of New York, is reprinted in the appendix hereto, at A1.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. §1257 (a) and U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

STATEMENT OF THE CASE

A question raised by this petition is whether The Supreme Court of The United States will allow a state court to circumvent standards of constitutional protection identified by this Court by imposing a requirement for notice of claim as a bar to suit in a Fifth Amendment claim that all use of property was taken without payment of just compensation.

The Appellate Division, First Department, in its memorandum decision dated Feb. 3, 1998, (Appendix A), granted summary judgment to The City of New York after holding that a state procedural requirement for notice of claim bars my regulatory takings claim on the basis of its assumption that my cause of action (that defendants took all use of my property without paying for it) lacks substantive merit and that the actions of defendants failed to drop below standards of constitutional protection identified by the jurisprudence of this Court.

The Appellate Division reached its finding without consideration that the degree of connection between the exaction demanded by the City of New York which blocked all use of my property and the projected impact of the proposed development failed to meet the causal nexus requirements set forth by this Court in its Dolan ruling.

A complexity of this case is that the state court did not decide it on its merits. The Court applied a procedural requirement for notice of claim on the basis of its assumption on the merits.

The requirement for notice would have been deemed met or found not to be required at all but for the Court's assumption on the merits, as argued infra.

I. FACTUAL BACKGROUND

I am the plaintiff in this suit in a partnership with a related corporation and submit this motion pro se.

My as-of-right Manhattan apartment house project was scuttled by the City of New York, which banned issuance of any permit for construction on my assembly of eight midtown Manhattan properties which I had acquired in 1985. The City based its right at law to do so upon a section of its Zoning Resolution (ZR 95-04) which allows a taking of an uncompensated easement without nexus or proportionality between an owner's project and the easement requirement.

Defendants certified that they required a transit easement, alleging a possible future need for a passage under some of the properties to build a pedestrian tunnel to connect two subway lines if a Second Ave. Subway is ever built. Once defendants certified their need for an easement, they were mandated by New York's zoning law to withhold issuance of a permit until I donated an easement, (App. H) which the City made impossible for me to give and was unwilling to accept. I was unable to proceed with construction or to make any other use of my vacant properties. The City then introduced rezoning legislation which in and of itself took all viable economic use of the property, limiting new construction to little more than what already existed.

Evidence supports my claim that the defendants could not ever have made use of an easement under my properties even if they had obtained it. The easement demand was promulgated as a political response to opposition to the project by influential neighbors to achieve delay in the issuance of a permit. Costs of ownership continued to accrue which in time made impossible any viable economic development of the property.

This case in not about an easement which defendants could not use and refused to accept. Defendants acted to create delay which added costs so substantial that my interim loss of all use of the property became permanent. While the delay continued, Defendant City of New York was able to block construction and legislate a downzoning. Each of the two actions, the permit ban

over a period of time and the downzoning, took all viable economic use of the property. While the permit ban remained in place, I could not build, sell or restore the property to its former use. I had already relocated all the tenants in the properties and severed utility connections from the street which could not be reconnected without permits banned by defendants.

I was forced to sell in 1988 at $10,000,000 less than the amount I invested in the properties when The City finally withdrew its permit ban by informing interested buyers it would not be enforced. The City proudly claimed credit for saving half of my midtown Manhattan property in the form of the "light and air above the property" to further "the health and welfare of future generations of New Yorkers."

The City did so solely at my expense.

I first sought recourse in Federal District Court, Southern District, where Judge Robert J. Ward held in 1991 that because a state court remedy existed, my federal regulatory taking claim was not ripe, 779 F. Supp. 287 at 300. Therefore, he did not decide it, although he did dismiss my federal equal protection claim, due process claims and per se regulatory takings claim.

This Court's decision in Dolan v. City of Tigard had not come down in 1991 when Judge Ward stated in the context of his discussion of my federal per se takings claim that an adequate nexus existed between the increase in population which my planned apartment house on E. 52nd St. would create in the general area and a possible future need for a pedestrian tunnel through the basements of my E. 53rd St. properties to connect two subway lines, one of which might someday be built, 779 F. Supp. at 299. Judge Ward's finding of nexus on the basis of a possible future need rather than an actual, present need could not have survived this Court's subsequent Dolan rulings.[1]

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[1]The Federal District Court decision (779 F. Supp 287) held in part, "According to plaintiffs, defendants were obliged to undertake an environmental impact study to determine whether plaintiffs' proposed development would have any effect on street congestion or subway use.

Although the easement requirement, as applied to plaintiffs' proposed development, must substantially advance legitimate interests of the City, the federal constitution does not require the City to undertake the type of detailed study that plaintiffs argue is necessary. The nexus between higher population density occasioned by new development and increased use of public facilities has long been recognized as sufficient to justify the transfer of a portion of developers' property to public use to help alleviate the additional burden placed on public services." Judge Ward continued:

"According to the affidavit of William Valletta, general counsel to the (defendant)DCP, the development proposed by plaintiffs --a 17 story building containing 153 apartments, a community facility and a restaurant--would have had precisely the type of impact that the TA District was designed to mitigate. Because this determination is sufficient to satisfy the nexus requirement of Nollan, plaintiffs' first argument in support of their takings claim must be rejected."

The federal court concluded, "Because the easement requirement satisfies the test announced in Nollan, and because any regulatory takings claim plaintiffs may have is not ripe for adjudication, defendants are entitled to summary judgment with respect to plaintiffs' takings claim."

(Judge Ward also noted that plaintiffs had not sought a variance; however, he did not address the futility of any BSA action after a recent change of zoning and the absence of any basis under New York law on which a variance could be sought, as noted infra.)

The second of two Appellate Division panels to rule on my case never found the differences between this Court's Dolan rulings and dicta of the Federal District Court upon which the state court relied to find lack of merit.

This petition for certiorari does not seek review of the 1991 decision of the Federal District Court Southern District of New York or of appellate findings which followed it. I complied with ripeness requirements of the federal courts by recommencing in state court under state and federal constitutional standards.

In its finding in Manocherian v. Lenox Hill Hosp., 84 NY2d 385,392, cert denied 514 US 1109) The New York Courts acknowledged that "a floor of constitutional protection for property owners" identified by this Court is law in New York.

My complaint alleging the taking of all use of my property absent just compensation raises the issue of whether defendants' permit ban on my vacant properties falls below that floor.

As between private parties, the state courts upheld federal standards in

I next brought an action in State Court based on some of the same facts, alleging a taking of property without just compensation and other state constitutional violations. (State claims in federal court were dismissed on abstention grounds.) This Court's Dolan findings were squarely before the New York Court where I first raised the issue of "rough proportionality."

The New York Appellate Division, First Department, finessed Dolan and found a requirement for notice existed in its Feb. 3, 1998, decision which is the subject of my petition. The second of two Appellate panels to address my case based its conclusion that my case lacked substantive merit "for the reasons in" the 1991 decision of the Federal District Court, one of which was Judge Ward's finding of nexus. The Appellate Panel applied no standard of scrutiny to defendants' claim that the exaction demanded by The City as a condition to issuance of a permit met This Court's nexus standards. The panel failed to rule on my claim that adequate causal nexus did not exist.

Now, seven years after I recommenced in State Court, The Appellate Division, First Department, decided that my regulatory takings claim is barred by a requirement for notice-of-claim because plaintiffs failed to submit a satisfactory excuse for delay in seeking leave to file late notice "and" (my emphasis) where plaintiffs' case is "without substantive merit" (Appendix A).

But for the New York Court's off-the-cuff, unsupported assumption on the merits, the court would have had at least an option and perhaps a requirement imposed by the language of the Statute to accept my motion for Leave to File Late Notice where

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Manocherian. Once the financial interests of a state municipality became involved, those standards, including this Court's clear rulings in Dolan, became victims of a misty requirement for notice of claim.

The City of New York gained years of delay by its motion for summary judgment on res judicata grounds, alleging my case in state court was nothing more than a repeat of my Sect. 1983 claim in federal court. Now the City in its state court responses alleges that I do not have rights under the Federal Constitution or federal statutes because I did not specifically identify my state law action as a Sect. 1983 claim.

defendants were on real notice and do not claim prejudice by the absence of formal notice.[2] (see Appendix G, New York General Municipal Law 50-e)

THE TIMING OF DEFENDANTS CONSTRUCTION PERMIT BAN ASSURED THAT ALL USE OF THE PROPERTY WOULD BE TAKEN FROM ME.

Defendants waited until I had vacated the premises,

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[2]If not for its assumption on the merits, the notice-of-claim requirement could not rationally have been imposed at all. The New York court failed to address cogent argument by my counsel in our pleadings that both state and federal standards of constitutional protection exclude a notice requirement where the taking of property without just compensation is claimed.

I sought leave to file late notice or deem notice requirements met within the time mandated by the Statute. GML 50-e(5) provides that in granting or denying leave to file late notice, "In particular, the court shall consider whether the defendant acquired actual knowledge of the essential facts constituting the claim within (90 days) or a reasonable time thereafter." Defendants' actual knowledge has never been in dispute, nor have defendants claimed prejudice as a result of a failure to receive timely notice of my claim. On these facts there was no basis for denying leave under GML 50-e(5) as the First Department recognized in Svanka v. City of New York, 73 A.D. 877 (1980). Its companion Second Department had held denial under these circumstances to be reversible error, Hayden v. Incorporated Village of Hemstead, 103 A.D. 2d 765 (1984).

It seems the Court decided the case had been around too long and chose to decide it on any grounds it could find. The notice requirement was convenient although hardly appropriate. The legislation of a downzoning is not a tort which triggers a notice requirement. The New York court has yet to suggest when actions taken by defendants created the requirement for notice.

Although the federal court refused, specifically, to reach the merits of my state law regulatory takings claim, the state court did so, applying its notice requirement on the basis of its finding of lack of substantive merit "for reasons in" the federal district court's outdated 1991 decision!

relocated all tenants, and disconnected utilities from the street to prepare for construction. Sophisticated defendant City planners had decided not to take any action to obstruct the project while my ability to build remained in doubt. Many developers have canceled projects in New York because of their inability to relocate tenants and vacate premises as required to obtain demolition permits and commence construction. Defendants acted only when it became apparent that if they continued to do nothing, they would be faced with a completed building by the time they were able to downzone.

Their stall, however, meant that when they finally imposed their permit ban, no use at all remained for the now vacant and fallow properties.

II. PROCEDURAL HISTORY

In a decision of the Federal District Court, Southern District, filed Dec. 9, 1991, where my federal claims were first raised, Judge Robert J. Ward granted summary judgment to defendants on grounds the case was not ripe, Sudarsky v City of New York, 779 F Supp 287, 299, affd 969 F2d 1041, cert denied 122 L. Ed2d 365, rehearing denied 122 L. Ed2d 803, motion to vacate denied F Supp, 1992 US Dist Lexis 16557, rehearing denied 1993 US Dist Lexis 53). Where state law provides a remedy, the case had first to be brought in state court.[3]

Judge Ward denied my motion for reargument and next denied my motion to reopen on new evidence (Oct. 28, 1992). Then on motion for reargument of the motion to reopen, the Court held it was making "clear" that no matter what evidence I provided, it would not "reach the merits" of my takings claim

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[3]Judge Ward also alluded to non-finality of the development potential of the property because plaintiffs had not sought a variance; however, a variance was and is available only in cases of peculiar, inherent physical features which were not present here (N.Y.C. Zoning Resolution section 72-20).

because the case was not ripe, as cited infra.

The merits were left to the state court, which has not yet reached them.

After plaintiff recommenced in state court, The State Supreme Court granted summary judgment to defendants on res judicata grounds although the federal district court had not reached the merits of my regulatory takings claim (Appendix E, March 22, 1994).

The Appellate Division, First Department, reversed and remanded (first Appellate Division panel, Appendix F, Oct., 1995). A second trial court then granted summary judgment on mistaken grounds of timeliness (Appendix B, Feb.19, 1997).

The second appellate panel reversed the timeliness finding but affirmed the grant of summary judgment, this time on notice-of-claim grounds, holding that in circumstances where the case lacks substantive merit "for the reasons in" the Federal District Court's findings and dicta, it would not consider my motion for leave to file late notice (Appendix A , Feb. 3, 1998). My pro se motion for reargument was rejected without comment.

The 1998 Appellate Division decision under appeal did not acknowledge this Court's "rough proportionality" standard or defendants' failure to undertake an individualized study to verify that a need created by my building was met by their easement demand and the permit bar.

> Ten years after I first commenced suit, no court has addressed the merits of my regulatory takings claim in any of the decisions which dot the record. The New York courts have relied on "reasons in" the 1991 decision of Judge Robert J. Ward in The Federal District Court which Judge Ward, himself, found inadequate to arrive at a ruling on the merits of my state law regulatory takings claim.

The New York Court of Appeals rejected my motions for leave to appeal three times, first on grounds that plaintiffs raised no substantial constitutional issue and then on motion for leave to appeal without explanation. Finally, on my pro se motion for reargument, The Court of Appeals once again refused to grant

leave to appeal without explanation of any sort (Appendix D, Feb. 23, 1999).

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS HELD THAT A REQUIREMENT FOR NOTICE OF CLAIM MAY NOT SERVE AS A BAR TO SUIT WHERE A SIGNIFICANT CONSTITUTIONAL ISSUE IS AT STAKE.

Constitutional rights warrant more than sterile formalities.

Whether my regulatory takings claim was labeled 42 U.S.C Sect. 1983 violation, the taking of all use of property without payment of just compensation violates both The New York State and The United States constitutions. How my attorney identified my claim in state court cannot be determinative of the outcome of the case if New York courts are not to drop below standards of constitutional protection identified by this Court's jurisprudence.[4]

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[4]In Felder v. Casey , 487 U.S. 131 (1988), this Court held that Wisconsin's notice-of-claim statute was "enacted to minimize governmental liability" (at 141-43). Felder establishes a number of pertinent considerations for determining whether a notice requirement may properly be imposed as a bar to a constitutional takings claim, i.e.

(1) whether application of the rule burdens the "civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts." Felder, 487 U.S. at 141.

(2) whether enforcement of such a procedure in Sect. 1983 actions brought in state court "will frequently and predictably produce different outcomes in civil rights litigation based solely on whether that litigation takes place in state or federal court," as has occurred here Id.

(3) whether the requirement for notice is "a neutral and uniformly applicable rule of procedure" rather than a substantive rule.Id.; see also Denari, 215 Cal. App. 3d at 1498.

This Court in Felder held that a notice of claim requirement may

II. MY CLAIM WARRANTS TRIAL OF THE ISSUES BECAUSE ACTIONS OF DEFENDANTS TOOK ALL USE OF MY PROPERTY, REGARDLESS OF THE PUBLIC PURPOSE OF THE TAKING.

In David H. Lucas v. South Carolina Coastal Council no. 91-453, the Supreme Court held that Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical - and economic - equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation."

III. BY THE TIME THE APPELLATE DIVISION REACHED ITS DECISION IN 1998 WHICH IS THE SUBJECT OF THIS PETITION, THE 1991 FEDERAL DECISION ON WHICH THE STATE COURT RELIED HAD BEEN SUPERCEDED, FIRST BY THIS COURT AND SECOND BY JUDGE ROBERT J. WARD, HIMSELF:

FIRST, THIS COURT'S FINDING IN DOLAN UNDERMINED JUDGE WARD'S 1991 RULING THAT ADEQUATE NEXUS EXISTED[5]

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not serve as a bar to suit in a case involving abuse of constitutional rights.

[5]Other dicta in the 1991 federal decision which may have provided reasons on which the state court relied to reach its assumption on the merits raised issues of fact and law. For example, as noted infra, Judge Ward alluded to non-finality of the development potential of the property because plaintiffs had not sought a variance; however, a variance was and is available only in cases of peculiar, inherent physical

SECOND, JUDGE WARD HAD BACKED AWAY FROM HIS 1991 FINDINGS IN A SUBSEQUENT DECISION WHICH THE STATE COURT FAILED TO ACKNOWLEDGE.

On my pro se motion for reargument of the Federal Court's Oct. 29, 1992, refusal to reopen, Judge Ward held he was

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features which were not present here (N.Y.C. Zoning Resolution section 72-20).

As framed by Judge Ward, the issue of my state law regulatory takings case was whether defendants "went too far" in applying the easement-taking provisions of Sec. 95-00 et seq. of the ZR, thereby destroying plaintiff's ability to make use of the property. The second panel failed to acknowledge that I alleged all use of my property was taken by defendants and did not, therefore, reach the factual issue my allegation raised.

Judge Ward opined that plaintiffs did not have a reasonable probability of vesting under federal standards of constitutional protection. Federal standards assume that a rezoning will take place at the earliest moment permitted by law. State standards differ. Judge Ward was unaware of requirements for public hearings which would have delayed a rezoning to the date which it actually occurred. The question of whether we could have vested under existing zoning without interference of defendants raises an issue of fact.

No issue of fact exists about whether without that interference we could have done *something* with the property, such as reconnected utilities, restored it to its former use as brownstones, or sold it.

The Appellate Division, second panel, did not acknowledge these issues. All these questions were raised by my attorneys in briefs before the Appellate Division, but the second panel did not reach the record in arriving at its assumption of lack of merit on the basis of which it imposed its notice of claim requirement.

If my case lacks merit, the New York court may throw it out but not on the basis of a requirement for notice applied because of a finding on the merits for reasons exhumed from a federal district court 1991 decision which no longer existed when the Appellate Division made its 1998 decision which is the subject of this writ.

making "clear" he did not "reach the merits."[6] (That was the job

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[6]In his order dated January 5, 1993, Judge Ward held as follows:

"The Court was clear in its 1991 opinion that it could not reach the merits of the regulatory takings claim, in any case, because the claim was not ripe."

Judge Ward added, "When a state provides adequate procedures for seeking 'just compensation,' the property owner cannot bring a takings claim in federal court until the owner has made use of the state court system, and plaintiffs did not make use of the state system. Sudarsky v. City of New York., 779 F. Supp. at 300-301."

The state court's findings here turn topsy turvy the balance between federal and state courts. The Appellate Division relied upon the nexus finding in the prior federal court decision which was refuted by Dolan and which was not sufficient for the federal court to reach the merits. The Appellate Division, First Department, second panel, then refused to accept responsibility for its finding of lack of merit by chalking up its decision to an otherwise inapplicable requirement for notice of claim!

Once Judge Ward made clear that his grant of summary judgment was based on ripeness and not on the merits of my regulatory takings claim, his "findings" fell into the category of dicta upon which the state court leaped to find lack of merit without a peek at my state law claims and the undisputed evidence on which those claims were based.

Perhaps the state court relied upon Judge Ward's dicta that before we made our final permit application, we knew about City plans to downzone. If so, the state court failed to address the following question: At the time we purchased the eight properties in the east fifties which comprised our assembly, relocated commercial and residential tenants at our own expense, severed utilities from the street to obtain demolition permits, and filed our first set of plans with the New York City Department of Buildings, were we on notice that the City would demand an easement for which it had no use to impose a moratorium on our use of the property while it commenced and completed a previously uncontemplated downzoning of "the area surrounding our property?"

The published decision of the Federal District Court, Southern District, contains a headnote error. The headnote states that plaintiffs refused to give the easement which the municipality demanded. The decision, itself, makes no representation. The Appellate Division may have relied upon that error to conclude plaintiffs were unwilling to give The City the easement it said it needed. If the second panel did so, it would have had

of the state court, which after ten years has avoided the merits as if they were the plague.) My motion to reopen was based on evidence that The City of New York had waived access into both subway stations that their pedestrian tunnel was intended to connect. The tunnel could not be built. A tunnel which cannot be built could not solve any problem. The New York Court was not deterred by this Court's Dolan ruling nor by Judge Ward's disclaimer on the merits.

IV. IF STATE COURTS CAN EVADE THE JURISPRUDENCE OF THIS COURT BY IMPOSING AT WILL A NOTICE REQUIREMENT TO PROTECT THE FINANCIAL INTERESTS OF THE COMMUNITY, MUNICIPAL REGULATORY AUTHORITIES NATIONWIDE WILL REMAIN FREE TO TAKE ALL USE OF PROPERTY WITHOUT PAYING FOR IT.

If this Court allows the decision of The Appellate Division, First Department, to stand, it will be granting renewed authority to planners and politicians to extort exactments in exchange for permits. At one time, such exactments were claimed on behalf of the community, later for the benefit of political figures who appoint planners, and at last as in this case for the profit of the planners or their associates.

Sophisticated agents of municipalities substitute delay for condemnation as a means of taking property for public use without paying for it. These abuses will continue unless This Court closes the notice-of-claim loophole used by municipalities to escape their constitutional obligations.

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to conclude that nothing plaintiffs had to say could be believed. We have consistently asserted we tried to give the easement and would have given "an easement to the moon" on E. 53rd Street where defendants asked for it to regain use of the property on E. 52nd Street where we had filed for a permit.

V. WHETHER A REQUIREMENT FOR NOTICE OF CLAIM MAY BAR AN INVERSE CONDEMNATION SUIT OR REGULATORY TAKING CLAIM BY AN OWNER OF PROPERTY IS A QUESTION WHERE DIFFERENCES EXIST BETWEEN RULINGS OF THIS COURT (FELDER v. CASEY), STATE COURTS AND THE FEDERAL CIRCUIT COURTS OF APPEAL.

Those differences require resolution by This Court.

VI. THE TAKINGS CLAUSES OF BOTH FEDERAL AND STATE CONSTITUTIONS ARE SELF-EXECUTING AND DO NOT PERMIT OF LEGISLATIVE INTERFERENCE.

Takings claims are the only constitutional "tort" claims to which the state was never immune. No law may circumvent or void a self-executing mandate, see New York State Association of Retarded Children v. Carey, 456 F. Supp. 85. The New York Court may not properly bar my regulatory takings claim on the basis of a requirement for notice imposed by the legislature. The legislature does not have the same power to place conditions on the right to seek damages against a municipality (in contrast to injunctive relief which does not require a notice of claim) as it has to impose conditions on other constitutional "torts" where liability exists because of legislative consent.

CONCLUSION

THE NEW YORK COURTS IMPOSED A STATE PROCEDURAL REQUIREMENT FOR NOTICE ON THE BASIS OF A FINDING ON THE MERITS WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The New York court failed to acknowledge or apply this Court's intervening Dolan decision which goes to the heart of the merits.

By reason of the above, I request that this petition for certiorari be accepted. A requirement for formal notice of claim intended by the New York legislature to deal with tort actions should not be available as a bar to a constitutional takings claim.

If I were rotting in jail for seven years, my right to fair trial would have been upheld many years ago. But as a man made an economic paraplegic by the events of this case, the New York court has held that I have no right to a hearing on the issues of a case which involves property rights and The Fifth Amendment.

The story of this case illustrates a legal Murphy's law. If an escape route is available which a state court can travel to protect the financial interests of a municipality in a takings case, the state court will follow that route at the expense of the jurisprudence of this Court.

Dated: May 14, 1999.
Respectfully submitted,

Peter Sudarsky

Peter Sudarsky, Petitioner

APPENDIX A

APPELLATE DIVISION, FIRST DEPARTMENT

Justices Milonas, J.P., Rubin, Tom, Massarelli, JJ.

Peter Sudarsky et al.,

plaintiffs-appellants,

Martin Berger

against

City of New York et al.,

defendants-respondents

Jane S. Earle

Ira J. Lipton

Order, Supreme Court, New York County (Norman Ryp, J.), entered Feb. 19, 1997, which denied plaintiffs' motion for leave to file a late notice of claim and granted defendants' cross motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.....

We decline to give the prior decision of this Court in this action (220 AD2d 353) law of the case effect as to anything other than "legal determinations that were necessarily resolved on the merits in the prior decision" (Baldasano v. Bank of New York, 199 AD2d 184). As such, none of the parties' arguments on this appeal are foreclosed. Although we do not agree that the action was untimely commenced, since CPLR 203 (b)(5)(i) was applicable to Supreme Court actions during the so-called transitional period (L1992, ch 216; see, Cambell v. Command Sec., 216 AD2d 508, 509), we find that a notice of claim is required for the causes of action plaintiffs assert, and that adequate notice had not been given. We decline to grant plaintiffs leave to file a late notice in the present circumstances where there is no adequate reason for plaintiffs' "delay in taking steps to obtain permission to give late

notice" (Matter of Rice v. City of New York, 180 AD2d 801, 802) and where plaintiffs' action is without substantive merit. For the reasons stated by the Federal Court in dismissing plaintiffs' prior action (see, Sudarsky v. City of New York, 779 F. Supp 287, affd 969 F.2d 1041, cert denied 506 US 11084, rehg denied a507 US 980), the challenged governmental action does not fall below a "floor of constitutional protection for property owners" (Manocherian v. Lenox Hill Hosp., 84 NY2d 385, 392, cert denied 514 US 1109).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED FEB. 3, 1998

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

The Hon. Norman RYP **Part 99**

Index no. 29446-92

Motion Sec. no. 09

CROSS-MOTION

Plaintiffs' motion to file a late notice of claim and defendants' CPCR 3211 cross-motions to dismiss are consolidated for determination.

This action originated in the United States District Court, Southern District of New York, where the Hon Robert J. Ward dismissed all federal claims on Dec. 6, 1991. This dismissal was affirmed by the United States Court of Appeals for the Second Circuit on May 8, 1992. Plaintiffs then commenced the herein action on Dec. 24, 1992. Defendants now cross-move to dismiss as time barred.. Where an action is dismissed by a federal court on non-meritorious grounds (or procedural grounds-federal issues notice?) as herein, the plaintiff has six months to recommence the action in State Court (CPLR 205(a)) In this instance the action was dismissed on Dec. 6, 1991, said dismissal was affirmed by The U.S. Court of Appeals, 2nd Cir., on May 8, 1992. However, plaintiffs did not recommence this action until December 24, 1992, more than one (1) year after the original dismissal and seven (7) and one half months after the affirmance of said dismissal. Accordingly, the Summons and Complaint is dismissed. Plaintiffs application to file a late notice of claim is denied as moot.

so ordered.

NORMAN RYP

Entered: Feb. 19, 1997

APPENDIX C

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, of Appeals Hall in the City of Albany on the *eighteenth* day of *November* 1998

PRESENT, HON. JUDGE S. KAYE, Chief Judge presiding.

1-10 Mo. No. 1108
Peter Sudarsky, et al.,
Appellants,

v.

City of New York, et al,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Stuart M. Cohen
Clerk of the Court

APPENDIX D

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, of Appeals Hall in the City of Albany on the *twenty-third* day of *February* 1999

PRESENT, HON. JUDGE S. KAYE, Chief Judge presiding.

Mo. No. 1496

Peter Sudarsky, et al.,

Appellants,

v.

City of New York, et al,

Respondents.

A motion for reargument of motion for leave to Appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY PART 22

PETER SUDARSKY, ET ANO

v. INDEX NO. 29446/92

THE CITY OF NEW YORK, ET AL

MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM

ENTERED APR. 14, 1994
COUNTY CLERK'S OFFICE NEW YORK

Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPSR para. 3212, seeking summary judgment is granted. Plaintiff's cross-motion for an order seeking leave to file a late notice of claim is denied.

From a reading of the papers it appears that the allegations submitted by the plaintiffs, in opposition to the summary judgment motion in this action, are similar to those submitted by plaintiffs for this same action in federal court. In granting defendants summary judgment in the federal action, the Honorable Robert J. Ward determined that the factual allegations made by plaintiffs in opposition to defendants' motion did not raise any material issue of fact necessitating a trial and that defendants were entitled to judgment as a matter of law. Sudarsky v. City of New York, 779 F. Supp 287 (S.D.N.Y. 1991). Therefore, the doctrines of collateral estoppel and res judicata prevent plaintiffs from relitigating the same issues of the same case.

As a result of the decision above, plaintiffs' cross-motion for leave to file late notice of claim is preempted, making the issue a moot point. Further, plaintiffs have already picked their forum and their case has already been decided. Thus, no notice of claim is required.

dated 3/22/94 Salvador Collazo s

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK - APPELLATE DIVISION, FIRST DEPARTMENT

PETER SUDARSKY ET AL., APPELLANTS,
M. Berger

v.

THE CITY OF NEW YORK ET AL., RESPONDENTS
L. Jaeger

MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM

DECIDED: OCT 31, 1995 **ENTERED: OCT. 31, 1995**

220 A.D.2d 353,* 633 N.Y.S.2D 26,; 1995 N.Y. App. Div.**

HON: Concur–Murphy, P.J., Rubin, Kupferman and Williams, J.J.

OPINION: [*353] [*27] Order, Supreme Court, New York County (Salvador Collazo, J.), entered April 14, 1994, granting defendants' motion for summary judgment dismissing the complaint on the grounds of res judicata and collateral estoppel, and denying plaintiffs' cross-motion to file a late notice of claim or to deem prior filings to constitute a notice of claim pursuant to General Municipal Law § 50-e, unanimously reversed, on the law, defendants' motion denied, the complaint reinstated and the matter remanded for further proceedings, without costs.

The plaintiffs assembled eight contiguous buildings on East 52nd Street and East 53rd Streets in Manhattan for the purpose of constructing a 17-story residential building on the East 52nd [*354] Street site and renovating the three buildings on East 53rd Street. They contend that by reason of various actions or inactions, the defendants held up the proposed project until the

area was downzoned, thus preventing [***2] the consummation of their plan and resulting in the sale of the parcel for $10 million, less than its fair market value before downzoning.

Plaintiffs initially sued in the United States District Court for the Southern District of New York, alleging constitutional claim and the defendants were granted summary judgment on plaintiffs' regulatory taking claim, basically on the ground that the matter was not ripe for adjudication inasmuch as there had not been a final determination by the local administrative agencies with respect to the issues and plaintiffs had not made use of the State court system in order to obtain compensation for the alleged taking, and dismissed plaintiffs' pendent State claims under the abstention doctrine (Sudarsky v City of New York, 779 F Supp 287, affd 969 F 2d 1041, cert denied 506 US 1084, reh denied 507 US 980, motion to vacate denied 1992 US Dist LEXIS 16557 [SD NY, Oct. 28 1992, Ward, J.], reh denied 1993 US Dist LEXIS 53 [SD NY, Jan. 5, 1993, Ward, J.].

Under the circumstances, the Federal court's determination was not [***3] final and so could not be the ground for application of the doctrine of res judicata, although some aspects might have a collateral estoppel effect, which question can only be determined when all of the contentions are considered in a trial of the issues.

The cross-motion by plaintiffs to file a late notice of claim or to deem prior filings to constitute a notice of claim was denied on the ground of mootness in view of the granting of summary judgment to the defendants on the ground of res judicata. Accordingly, upon remand the cross-motion should be considered anew.

Concur--Murphy, P.J., Rubin, Kupferman and Williams, JJ.

APPENDIX G

NY CLS Gen Mun ° 50-e

GENERAL MUNICIPAL LAW
ARTICLE 4. NEGLIGENCE AND MALFEASANCE OF PUBLIC OFFICERS; TAXPAYERS' REMEDIES

NY CLS Gen Mun ° 50-e (1998)

° 50-e. Notice of claim

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

(b) Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law.

2. Form of notice; contents. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable but a notice with respect to a claim against a municipal corporation other than a city with a population of one million or more persons shall not state the amount of damages to which the claimant deems himself entitled, provided, however, that the municipal corporation, other than a city with a population of one million or more persons, may at any time request a supplemental claim setting forth the total damages to which the claimant deems himself entitled. A supplemental claim shall be provided by the claimant within fifteen days of the request. In the event the supplemental demand is not served within fifteen days, the court, on motion, may order that it be provided by the claimant.

3. How served; when service by mail complete; defect in manner of service; return of notice improperly served.

(a) The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation.

(b) Service by registered or certified mail shall be complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state.

(c) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation

against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fail to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

(d) If the notice is served within the period specified by this section and is returned for the reason and within the time provided in this subdivision, the claimant may serve a new notice in a manner complying with the provisions of this subdivision within ten days after the returned notice is received. If a new notice is so served within that period, it shall be deemed timely served.

4. Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

5. Application for leave to serve a late notice.

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the

court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

6. Mistake, omission, irregularity or defect. At any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

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CITY OF NEW YORK - TRANSIT AUTHORITY
JOINT CERTIFICATION

DEPARTMENT OF CITY PLANNING
CITY OF NEW YORK

LAND USE REVIEW

February 19, 1987

Mr. George C. Sakona
Borough Superintendent
Department of Buildings
2003 Municipal Building
New York, New York 10007

RE: 53rd Street Transit Authority Easement
Block 1326-Lots 10, 11, 12
13, 14, 38, 39 with Air Rights
from Lot 140
Sudarsky Associates, Ltd.
870497 ZCM

Dear Mr. Sakona:

The above zoning lot is situated within the boundaries of the Special Transit Land Use District. Pursuant to Section 95-041 of the Zoning Resolution, and in accordance with a procedure agreed upon with the Transit Authority, the City Planning Commission and the Transit Authority jointly certify that a transit easement volume is required on the above zoning lot.

You will be notified when a specific easement volume is approved. Until then, no building permit should be granted for the above location.

Sincerely,
Marcelyn Anhouse
Deputy Director

Supreme Court, U.S.
FILED
JUL 28 1999
OFFICE OF THE CLERK

No. 98-1844

In The

Supreme Court of the United States

PETER SUDARSKY,

Petitioner,

v.

CITY OF NEW YORK, NEW YORK CITY PLANNING DEPARTMENT, NEW YORK CITY TRANSIT AUTHORITY, and THE METROPOLITAN TRANSIT AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

SUPPLEMENTAL BRIEF

PETER SUDARSKY
Petitioner, Pro Se
135 Central Park West
New York, New York 10023
(212) 595-7172

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BASIS FOR RULE 15.8
SUPPLEMENT TO PLAINTIFF'S PETITION

This rule 15.8 supplemental brief is based on This Court's decision in *The City of Monterey v. Del Monte Dunes Corp.* (119 S.Ct. 1624), which bears directly on my petition for certiorari in *Sudarsky v. City of New York.*

In both cases the municipality came up with a series of constantly changing requirements which put plaintiffs' development proposals on permanent hold. After years of dangling a carrot in front of the nose of the respective plaintiffs, it became apparent that each defendant had effected a taking of all use the owners could make of their property.

Although the facts of both cases are similar and the causes of action identical, the decisions of the federal and state courts are diametrically opposed. Either the Ninth Circuit of the Court of Appeals or the Appellate Division First Department of New York erred. This Court has now upheld the federal court's award of damages in a regulatory takings case where just compensation has been denied.

In contrast, the New York court in *Sudarsky v. City of New York* rejected my damage claim and granted summary judgment to The City after an assumption that my case lacks merit. The court reached its assumption without consideration of factual issues essential to its finding by either a jury or court. Based in part upon its erroneous and unexplained assumption, The New York court then found a requirement for notice of claim and rejected my motion for consent to file late notice or deem notice requirements met.

My petition for *certiorari* asks This Court to resolve the inconsistency between the federal and state court systems. This Court's clear answers in its *City of Monterey* decision are meaningless in New York if the New York courts can circumvent standards of constitutional protection for property owners.

> My petition for *certiorari* raises, therefor, the question of whether a municipality (as opposed to a state or federal agency) may avail itself of a strictly procedural notice-of-claim barrier to bar what would otherwise be a meritorious case where a taking of property is alleged to have occurred absent just compensation in violation of The Fifth Amendment.

For all the reasons in *The City of Monterey* and its concurring and dissenting opinions, my regulatory takings claim warrants trial.

REVIEW OF ESSENTIAL FACTS AND PROCEDURAL HISTORY

I have alleged that all use of my property was taken by defendant City of New York by a series of actions and inactions which resulted in the forced sale of the property at a price of $10,000,000 less than its fair value after The City withdrew its conditioning of an as-of-right permit upon my granting an uncompensated easement.

Feb. 3, 1998, the Appellate Division, First Department, upheld a decision of the court below granting summary judgment to the City on grounds that plaintiff failed to recommence the case in state court within applicable time limits following its dismissal on ripeness

grounds in federal court. Although The Appellate Division did not "agree with" the finding of the court below on the timeliness issue, the appellate panel went on to find that a notice of claim was required where plaintiff failed to give an adequate reason for delay in seeking leave to file late notice *and* in circumstances where plaintiff's case lacks "substantive merit." (Appendix A)

The Appellate Division gave no reasons for its assumption on the merits. The panel made reference to "reasons in" the dicta of a 1991 decision in Federal District Court, Southern District, by Robert J. Ward, Jr., but the panel failed to find in the record that Judge Ward, himself, held he had made "clear" that he did not "reach the merits" of my regulatory takings claim.

ARGUMENT

This Court's decision in City of Monterey establishes that a finding on the merits of a regulatory takings case where a claim exists that all use of property has been taken warrants determination of whether all use of property was, in fact, taken and whether actions taken by defendants which impact upon use of property "substantially advanced a legitimate public interest."

The New York Appellate Division's grant of summary judgment to The City precluded trial of these issues by either a jury or court of competent jurisdiction. Instead, the New York Court imposed a notice requirement in part upon the basis of its unsubstantiated assumption on the merits.

The New York Court might just as well have said "This case has no merit because we intend to protect the financial interests of The City, and that is reason enough."[1]

DICTA IN THE 1991 DECISION OF THE FEDERAL DISTRICT COURT DID NOT PROVIDE A BASIS FOR A FINDING OF LACK OF MERIT.

The New York court may have relied upon dicta in a 1991 federal district court opinion that was issued before This Court's decision in *Dolan v. City of Tigard*. This

[1] Defendants alleged that their permit ban was intended to facilitate obtaining an easement from plaintiff to provide an alternate route for a future pedestrian tunnel to connect two subway lines. Plaintiff alleges that because subway access for the tunnel was permanently waived into both subway stations a tunnel was intended to connect, that the easement was a sham. The tunnel could not be built, not now, not ever. A tunnel which cannot be built cannot facilitate any solution to a problem which might have been created by my plans for a new apartment house a block away.

The conditioning of issuance of a permit on my grant of an easement raises an issue of fact as to whether defendants' permit ban met requirements for nexus set forth in This Court's *Dolan* ruling or served any legitimate public purpose. The ban continued for a year after defendants downzoned the property. Political convenience rather than planning needs may have motivated the actions of The City. The certification of the easement requirement may have been intended to provide a smoke screen to evade Supreme Court jurisprudence and preserve the power to take property without paying for it.

The New York Court did not acknowledge that an issue of proportionality was raised in my complaint.

Court's findings in *Dolan* made obsolete the federal district court's finding of adequate nexus in this case.

"LACKS SUBSTANTIVE MERIT" IS BECOMING A TERM OF ART WHICH IS INAPPLICABLE TO THIS REGULATORY TAKINGS CLAIM.

It suggests that the court wants to avoid the work of reaching the record and still escape judicial review. Reasons for the panel's assumption on the merits remain concealed in this case involving what in layman's terms can be called municipal theft of property.

The panel may have assumed that in a period of market weakness plaintiff lacked the resources to build the project.[2]

More likely, The Court acted in the belief that it was protecting the right of municipal regulators to regulate. If so, the New York panel was operating without respect for limitations to that right imposed by This Court's jurisprudence.

Whatever reasons the panel may have had for its assumption on the merits, it did not share them with plaintiff or with The Appellate Division. This Court is left with the problem of deciding whether the panel's casual

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[2] Because the panel made no reference to the record which was before The Court in my first appeal in which the first panel rejected a *res judicata* finding of the trial court, the second panel may not have realized that many of the apartments in the planned project had been pre-sold to the Japanese bank financing the project. The Sumitomo Bank required apartments for its own executives within walking distance of its executive offices on Park Ave. in the area where living units for its executives had not been available.

assumption of lack of merit takes precedence over standards of constitutional protection for property owners set forth by This Court in a line of decisions extending over more than 120 years commencing with *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L.Ed. 557 (1871) and concluding with *City of Monterey v. Del Monte Dunes Corp.* (infra).

Defendants' waiver of a response leaves undisputed the facts in my petition. This Court's findings in *The City of Monterey* provide authority for petitioner's argument that the court below was wrong when it came up with its assumption on the merits and its grant of summary judgment.

I ask The Court to accept this petition for *certiorari* or alternatively to reverse and remand for trial. This Court's decision in *The City of Monterey v. Del Monte Dunes* answers questions of law my case may present.

Trial of the issues is warranted.

Submitted by plaintiff,

PETER SUDARSKY